In the Supreme Court of the United States

October Term, 1975

No. 75-1752

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY
Appellants,

vs.

EMPLOYMENT SECURITY COMMISSION
OF THE STATE OF NEW MEXICO
and
LANA JEAN NOLAN, *et al.*,
Appellees.

On Appeal From The Supreme Court Of The
State Of New Mexico

MOTION OF APPELLEE TO DISMISS APPEAL

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KIMBELL, INC., d/b/a FOODWAY,
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EMPLOYMENT SECURITY COMMISSION
OF THE STATE OF NEW MEXICO
and
LANA JEAN NOLAN, *et al.*,[1]
Appellees.

On Appeal From The Supreme Court Of The State Of New Mexico

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OPINIONS BELOW

The decision of the Supreme Court of the State of New Mexico is unreported but is set forth in the Appendix, *infra* at p. 3a. The decision of the Supreme Court of the State of New Mexico on Appellant's Motion for Rehearing is also unreported but is set forth in the Appendix, *infra* at p. 21a. The opinion of the Supreme Court of the State of New Mexico in *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission*, which the Supreme Court for the

[1]This appeal concerns unemployment compensation claims by 198 individuals employed by Appellants herein. The names of all claimants are set forth in the Appendix, *infra* pp. 1a-2a.

State of New Mexico incorporated as the basis for its decision in this case is reported at .... N.M. ...., 554 P.2d 1161 (1975) and is set forth in the Appendix, *infra,* at pp. 4a-20a. This statement of the OPINIONS BELOW and the referenced material set forth in the Appendix is identical to the corresponding statement and referenced material in Appellant's JURISDICTIONAL STATEMENT and is reprinted in this Motion for the convenience of the Court.

JURISDICTION

Appellee accepts the statement of JURISDICTION contained in Appellant's JURISDICTIONAL STATEMENT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellee accepts the statement of controlling CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED contained in Appellant's JURISDICTIONAL STATEMENT.

QUESTION PRESENTED BY APPEAL

Appellee considers Appellant's presentation of the QUESTION PRESENTED BY APPEAL to be too broadly stated and would rephrase the Question as follows:

Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by interfering with the preemptive jurisdiction of federal labor law?

STATEMENT OF THE CASE

Appellee accepts Appellant's STATEMENT OF THE

CASE with the modification that the Supreme Court of the State of New Mexico affirmed the specific findings and conclusion set forth in the Decision of the Employment Security Commission of New Mexico, issued June 21, 1972, that in accordance with established state law precedents[2] the economic burden suffered by the Employer-Appellants as a result of the labor dispute were not substantial, did not significantly interfere with the employer's normal business operations throughout the duration of the labor dispute and did not amount to a "stoppage of work" at the employer's premises within the requirement of §55-9-5(d), N.M.Stat.Ann. (Supp. 1975). (R. 2-3).

Appellee Adds the Following Facts Material to the Consideration of the Question Presented.

In its history of adjudicating the applicability of the labor dispute disqualification provision of the New Mexico Unemployment Compensation Statute, the Employment Security Commission of New Mexico has awarded benefits to claimants whose unemployment was due to a labor dispute in only three cases, and only under the "stoppage of work" interpretation sustained by the Supreme Court of New Mexico in this case. (R. 63).

The labor dispute involved in this case was settled on December 4, 1971. (R. 26). No decision of the Employment Security Commission of New Mexico holding the Claimant-Appellees eligible for benefits under any provision of the Unemployment Compensation Law of New Mexico was made until after that date. (R. 5-67).

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[2]*Inter-Island Resorts Ltd. v. Akahane*, Ha, 377 P.2d 715 (1962); *Meadow Gold Dairies of Hawaii Ltd. v. Wiig*, 50 H. 225, 437 P.2d 317 (1968); *Cumberland and Allegheny Gas Co. v. Hatcher*, 147 W.V. 630, 130 S.E.2d 115; *Ahnne v. Dept. of Labor and Industrial Relations*, 53 H. 185, 489 P.2d 1397.

I

THE QUESTION PRESENTED DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION OF PREEMPTION SUFFICIENT FOR THIS COURT TO TAKE JURISDICTION

The New Mexico Supreme Court, in its controlling opinion in the associated case of *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission, supra,* Appendix, p. 11a, considered the federal question of preemption raised before this Court by Appellants and decided, based upon its interpretation of state law as applicable to the particular facts of this case, that no substantial question of interference with federal labor law policy existed, and that under its interpretation, the administration of the State unemployment compensation law did not conflict with the preemption rule set down by this Court in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959) or *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971). It is not entirely clear from the New Mexico Supreme Court's rejection of the rational expressed by the District Court in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations,* 405 F. Supp. 275 (D. Hawaii 1975), whether it was deciding that, under its interpretation of the New Mexico statutes, there was no conflict between the state administration of unemployment compensation and federal labor policy as a matter of law, or whether it was adopting the balancing of state versus federal interests approach exhaustively developed by the First Circuit Court of Appeals in *Grinnell Corp. v. Hackett,* 475 F.2d 449 (1st Cir, 1973) *cert. denied,* 414 U.S. 858 (1973). Whether the New Mexico Court meant to say that, under the particular facts of this case, the issue was exclusively one of state law interpretation and raised no colorable federal question or

that the potential interference with federal labor policy was too remote and tangential to outweigh state interest, its opinion would appear sustainable and would not, under established principle of U. S. Supreme Court review, give rise to assumption of jurisdiction by this Court.

It is important to note that, in its controlling opinion in *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission, supra,* the New Mexico Supreme Court was not going beyond the facts of these two cases which, for purposes of the federal question presented on appeal to this Court, were virtually identical. Unlike the Rhode Island statute which this Court was addressing in *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974), the New Mexico law, like a majority of the States' laws, does not provide for payment of benefits to strikers after a fixed period of disqualification. The general rule under New Mexico law is that claimants are disqualified from receipt of benefits for the duration of their unemployment resulting from a labor dispute which causes a substantial stoppage of work at their place of employment. As indicated in the record, the Employment Security Commission of New Mexico has allowed payment of unemployment compensation benefits to strikers in only three cases in its history, including the two cases discussed in this appeal, and only under facts similar to those present in this case where there has been no appreciable impact from the strike on the employers' continued business operations. In contrast to the Rhode Island law, the interpretation by the New Mexico Supreme Court of the New Mexico unemployment compensation statutes provides no fixed or definite policy of payment of benefits to strikers, nor allows any expectations of such payment upon which employees could reasonably predicate labor dispute strategy. In fact, the interpretation by the New Mexico Supreme Court as to when benefit payments to strikers

might be authorized runs directly counter to the employees strike objectives which is to impose as substantial an impact on the employers' business operations as possible to increase his economic burden and persuade him to a satisfactory settlement. To the extent this avowed strike strategy is realized, the eligibility of striking employees for benefits is defeated.

It is apparent, therefore, that neither the statistical history of payment of benefits to strikers nor the inconsistency between strike objectives and eligibility for benefits is likely to make the administration of the New Mexico unemployment compensation law a factor in labor dispute negotiations or to interfere with federal labor policy. The case on appeal here as well as the *Albuquerque-Phoenix Express* case illustrates this point. In neither case did the Employment Security Commission ever reach a decision on the eligibility of the claimants for benefits until after the labor dispute was settled between the parties and a new contract agreement signed.

Although this Court has established a rule of preemption in the area covered by federal labor law which broadly prohibits state regulation of matters arguably regulated by the NATIONAL LABOR RELATIONS ACT and the LABOR MANAGEMENT RELATIONS ACT, and proscribes state conduct which would interfere with the scheme of federal labor policy, it has also stated that it would not extend that doctrine of preemption so far as to "presume that congress meant to intrude so deeply into areas traditionally left to local law," *Motor Coach Employees v. Lockridge, supra,* p. 297; or to withdraw from the States the power to regulate "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act," *San Diego Building Trades Council v. Garmon,*

supra, p. 243; or "where the particular rule of law sought to be invoked before the [State] tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by federal labor statutes." *Vaca v. Sipes,* 386 U.S. 171 (1967), cited in *Motor Coach Employees v. Lockridge, supra,* pp. 297-298.

The Supreme Court of New Mexico dealt with the eligibility of the claimants for unemployment compensation benefits as a matter exclusively and traditionally within the scope of local state law and found adequate State law grounds to support its decision. It considered the question of conflict between the allowance of benefits to strikers, within the narrow limits of its decision, and federal labor policy and determined that under the limited exception permitted by its interpretation no significant conflict existed. Indeed, it is difficult to see how the payment of benefits within the limits of this exception could potentially affect the balance of interests between the parties to a labor dispute, but it is not difficult to ascertain that the New Mexico Supreme Court was addressing itself to a substantial economic concern of local importance to the State and its citizens.

The New Mexico Supreme Court's decision makes no pretense of regulating any activities arguably protected or proscribed by §§ 7 and 8 of the NATIONAL LABOR RELATIONS ACT; it does not allow the payment of benefits to strikers with any degree of fixed or definite expectancy as would possibly be the case under the Rhode Island law, and it negates any reasonable assumption that the administration of the New Mexico law would significantly interfere with any federal labor law policy. The QUESTION PRESENTED, then, within the context of the New Mexico Supreme Court's interpretation raises no substan-

tial federal question or any issue of sufficient importance to warrant this Court's assumption of appellate jurisdiction.

II

THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD UPON WHICH TO REVIEW THE FEDERAL QUESTION PRESENTED

The First Circuit Court of Appeals in *Grinnell Corp. v. Hackett, supra,* and *ITT Lamp Division v. Minter,* 435 F.2d 989 (1st Cir. 1970), *cert. denied,* 402 U.S. 933 (1971), viewed the asserted conflict between the payment of state unemployment benefits to strikers and federal labor policy, within the context of the Rhode Island law, as a problem of balancing state versus federal interests. In a well reasoned and perceptive opinion in both the *Grinnell* and *ITT* cases, the Circuit Court established the necessity for an evidentiary record to show, if possible, the actual impact resulting from the payment of welfare and unemployment benefits to strikers on the balancing of interests in a labor dispute. and the relative importance of state versus federal interests in the results. This Court implicitly endorsed the approach of the First Circuit Court of Appeals by denying certiorari on appeal in both cases. The Federal District Court for Hawaii, in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations, supra,* although adopting the *a priori* assumptions rejected by the First Circuit Court of Appeals, did not disagree that an evidentiary record would be of value in determining the validity of the preemption question involved in this issue.

There is not a scintilla of evidence in the record of this case to support consideration of the questions posed by the

First Circuit Court of Appeals in its *Grinnell* and *ITT* opinions. No such evidentiary record was attempted by the Appellants in the State courts, nor could such a record have been established in this case since the labor dispute had been settled before the Employment Security Commission decided that the striking claimants were entitled to any unemployment benefits.

CONCLUSION

For the reason stated herein, the appeal in this case should be dismissed for want of probable jurisdiction.

Respectfully Submitted,

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State of New Mexico

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Dated: April 28, 1976.

Appendix

Names of All Individual Claimants

Kimbell, Inc., d/b/a Foodway

Lana Jean Nolan, Lucille Virginia Collins, Danie B. Clingman, Susie Padilla, Clyde R. Duncan, Dorothy L. Gray, Earl W. M. Speis, Dorothy J. Schwach, Jimmy M. Carroll, John Davis, John G. Lucero, Rudolfo Garrillo, Charlie A. Ortega, Beatrice Lopez, Bernal Sanchez, Pola S. Pacheco, Eloy L. Gilbert, Joe C. Chavez, Ruby Sweeney, Frieda V. Rael, Lorraine D. Billings, Dolores A. Vigil, Theresa Saavedra, Dorma Jean Trusty, Pete Aranda, Rosable Griego, Benito R. Baca, Robert P. Chavez, Michael D. Flores, Richard A. Mares, Delubino Jr. Romero, Robert E. Padilla, Agnes Olguin, Joe L. Apodaca, Imogen H. Holiday, Margaret Helen Roach, Ina B. Beck, Wayne Lee Johnson, Kathleen Burke, Judith S. Wiles, Victor Padilla, Jeanne D. Kohlman

Furr's, Inc.

John M. Cosentino, Arthur L. Bingaman, Bate R. Grise, Louise M. Logan, Willie M. Whitten, Mary M. Noble, Lawrence O. Saul, Frances K. Montoya, Finnimore M. Sanchez, Yoko S. Downey, Joy Barnett, John Carl Wright, Bill D. Cawthon, Bea M. Buffenmeyer, Edna I. Kotschwar, Benny Romero, Jake Aragon, Mary C. Puckett, Thelma Montoya, Aurora D. Baldonado, Admundo C. Bernal, Adolfo J. Trujillo, Paul Pacheco, Jr., Eloy Romero, Fred C. Sandoval, Patricia L. Mutchie, Tommy Torres, Betty A. Thornton, Bee Woodward, Rose J. Lovato, Narciso C. Quintana, Des W. Beevers, Gary J. Miller, David A. Johnson, Charles D. Whitmore, Larry L. Williams, Corine Ortega, Cornalio Padilla, Dolores S. Hemsing, Richard Moore,. Armando Gandara, Ronnie Morga, Richard C. Clifton, Jr., James M. Coffman, Sandra Ortiz, Linda E. Snider, Eddie P. Varela, Timothy L. Sandoval, Danny Gutierrez, Sandra L. Seaborn, Jane Elizabeth Cast, Richard J. Mahboub, Jr., Barbara A. Chavez, Phyllis Ann Abel

Safeway Stores, Inc.

Stanley S. Skibitski, Ruby G. Burkhardt, Samuel G. Tolley, Clarence P. Dunn, Jack D. Wise, Nancy Shama, John S. Mickler, Delmer Eugene Clem, Horace W. Jones, Carlton R. Burkhardt, Sybil D. Webb, Donna Odell Hatfield, James C. Foster, Michael Shreve, Robert J. Weinheimer, Kathleen G. Romero, Harry J. Welesky, Ruth D. Perea, Donila D. Gallegos, Frank Aranda Griego, Raymond Plunkett, Julian Ortiz, Eyrel A. Moore, Julian Smith, Joseph W. Garcia, John T. Evans, Fidel S. Lopez, Mary Louise Karns, Joe L. Gomez, Tillie Apodaca, Wilma L. Jones, Jimmy Pacheco, Charlie J. Torres, Estella G. Barros, Lillian M. Dennis, Nellie Montoya, Albert M. Gonzales, Pablo O. Lopez, Stella Sanchez, Vincentita Lujan, Maria G. Maes, Christa Dora Sanchez, Ruby E. Wormington, Dovie C. Brown, Minfa O. Sanchez, Samuel Jaramillo, Fred E. Chavez, Manuel D. Lucero, Amadeo Sandoval, Al E. Copeland, Antonio A. Villanueva, Eloy Jaime, Horacio E. Martinez, Fred Montoya, John A. Gerhardt, Robert M. Torres, James C. Chavez, Anthony Cano, Ray E. Luna, Oliver J. Schaffer, Freddy A. Salazar, Jack L. Archer, Frank B. Gurule, Gerald L. Speis, Robert B. Haislip, Donna L. Grubb, Mary Archuleta, Joe A. Arias, Harry Valdez, Maryann S. Sprouse, Perfecto Z. Sanchez, Bunn Hern III, Jose F. R. Maestas, Nancy R. Romero, Virginia A. Lovato, Billy Roybal, Robert Sierra, Billy E. Quintana, Alfonso G. Chavez, Ralph A. Montano, Debbi Ann Alires, Felix Russell Lopez, Andre F. Chene, Tony J. Kozlowski

Shop Rite Foods, Inc., d/b/a Piggly Wiggly

Janet Gail Davis, Donald K. Kelley, Tamsye M. Romero, James A. Etherington, Richard N. Schultz, Thomas C. Campbell, Betty Lou Reed, Richard R. Tafoya, Raymond C. Gallegos, Boni Baca, Jose A. Navarro, Randy R. Carter, James H. Ingram, Louis E. Saavedra, Fred C. Encinias, Benny A. Romero, Roger Urioste, Patricia L. Lawson

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Monday, December 29, 1975

NO. 10323

KIMBELL, INC., d/b/a FOODWAY, et al.,

Petitioners-Appellees,

vs. **Bernalillo County**

EMPLOYMENT SECURITY COMMISSION OF NEW MEXICO,
Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,
Respondent-Claimant
Employees-Appellants.

APPEAL FROM DISTRICT COURT
BERNALILLO COUNTY

DECISION

On the basis of the Court's opinion in Albuquerque-Phoenix Express vs. Employment Security Commission (No. 10247, Opinion filed December 24, 1975), the Judgment of the District Court of the Second Judicial District is reversed.

IT IS SO ORDERED.

John B. McManus, Jr., Chief Justice
Samuel Z. Montoya, Justice
Dan Sosa, Jr., Justice

WE DISSENT:

LaFel E. Oman, Justice
Donnan Stephenson, Justice

Filed: December 24, 1975

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

ALBUQUERQUE-PHOENIX EXPRESS, INC.,
Petitioner-Appellant,

vs. No. 10,247

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,
Respondent-Appellee,

and

ROBERT R. BURGESS, et al.,
Claimants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
FOWLIE, Judge

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OPINION

McMANUS, Chief Justice.

This matter was brought in the District Court of Bernalillo County for review upon certiorari of a decision of the

Employment Security Commission (Commission) that certain claimants for unemployment compensation benefits, employees of Albuquerque-Phoenix Express, Inc., petitioner-appellant (Company), who were unemployed as a result of a labor dispute were eligible to receive unemployment benefits. This matter was presented to the court upon briefs and oral argument. From a judgment of the district court dismissing the Company's appeal and affirming the judgment of the Commission, the Company appeals to this Court.

After receiving the decision of the court adverse to it, the Company, by this appeal requests review of the following points:

1. Claimants were not available for work nor were they actively seeking work as required by § 59-9-4(A)(3), N.M.S.A. 1953 Comp.

2. Claimants were disqualified under § 59-9-5(a), N.M. S.A. 1953 Comp., as they left work voluntarily without good cause.

3. The employees should have been disqualified under § 59-9-5(d), N.M.S.A. 1953 Comp., as there was a "stoppage of work" at the Company's premises.

4. Even if "stoppage of work" is defined as a substantial curtailment of the employer's business, such a curtailment did occur.

The first issue raised concerns § 59-9-4(A)(3), supra, which provides, in part, as follows:

"A. An unemployed individual shall be eligible to receive benefits with respect to any week *only* if he:
• • • •

"(3) is able to work and is *available for work* and is *actively seeking work;* • • •" (Emphasis added.)

The Appeals Tribunal for the Commission and the Commission itself, which adopted the ruling of the Appeals Tribunal, determined that twelve of the seventeen claimants were available for and actively seeking work. On this issue, the finding of the Appeals Tribunal, being representative of each of the twelve claimants, read in relevant part, as follows:

> "The claimant was required to register for work with the New Mexico State Employment Service as a prerequisite to filing for unemployment benefits. The claimant also sought work through the union ([Teamsters] Local 492), which maintains an out-of-work list and a hiring hall. During several weeks while filing continued claims, he was successful in obtaining temporary work through the union. During about seven of these weeks, he earned more than his weekly benefit amount ($56.00). The evidence shows that the claimant was available for full-time work had such been offered to him."

The Commission and the court below adopted this finding and we conclude that there was substantial evidence to support such a finding.

The employer seeks to have us interpret the availability and active search for work provisions of § 59-9-4(A)(3), supra, as establishing an absolute standard of availability for permanent new work with no limitations or restrictions of any kind, regardless of the circumstances prevailing in particular cases. Applying this standard to persons whose unemployment results from a labor dispute and holding them unavailable because they will not immediately return to their jobs with the employer with whom they are disputing or will not sever their employment relationship with that employer and seek permanent new work, would in all cases make such persons ineligible and render the labor dispute disqualification provisions of § 59-9-5(d), N.M.S.A. 1953 Comp., totally superfluous. (That section will be discussed in more detail in our consideration of "stoppage of work.")

On the basis of individual interviews with each claimant by Commission personnel, written documents and other reports in each claimant's file, and the record before the Commission's Appeals Tribunal, where all parties were represented, the Commission found that the claimants were available for and actively seeking work as required by § 59-9-4(A)(3), supra. The Commission further found that a number of claimants had obtained temporary intervening work, and that picket line duty was not mandatory and did not interfere with the claimants' search for or acceptance of work.

It seems obvious that the claimants herein were already employed by the Company. They expected only a temporary unemployment period and, therefore, could be available only for temporary intervening work. It would not make much sense for the Commission to demand that they, in fact, quit their jobs and really join the ranks of the unemployed, or that they abandon their legal rights and economic interest in the labor dispute and return to their jobs with the employer with whom they were disputing on the premise that their dispute was without merit.

In fact, § 59-9-5(c)(2), N.M.S.A. 1953 Comp., expressly provides:

> "Notwithstanding any other provisions of this act [59-9-1 to 59-9-29], no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; * * *."

Another point for review concerns whether or not claimants left work voluntarily without good cause. The Commission held inapplicable, in the case of labor disputes such as we find here, the voluntary leaving provision of § 59-9-5(a), N.M.S.A. 1953 Comp., reading:

> "An individual shall be disqualified for benefits—

"(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one (1) nor more than thirteen (13) consecutive weeks of unemployment which immediately follow such week (in addition to the waiting period) as determined by the commission according to circumstances in each case, and such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by his weekly benefit amount."

In Inter-Island Resorts, Ltd. v. Akahane, 46 Haw. 140, 156-58, 377 P.2d 715, 724-25 (1962), the Supreme Court of Hawaii analyzed a provision in the Hawaii Employment Security Law quite similar to our provision, § 59-9-5(a), supra, in the following way:

"This argument [that claimants unemployed as the result of a labor dispute should be disqualified under the voluntary leaving provisions of the unemployment compensation law] is in direct conflict with the generally accepted interpretation of the voluntary leaving and the labor dispute disqualification provisions of the various state laws. The consensus supports the conclusion that the two disqualification provisions are mutually exclusive and that an individual whose unemployment is due to a 'stoppage of work' which exists because of a 'labor dispute' cannot be said to have 'left his work voluntarily' within the meaning of the voluntary separation provision. T. R. Miller Mill Co. v. Johns, 261 Ala. 615, 75 So.2d 675; Intertown Corp. v. Appeal Board of Mich. Unemployment Comp. Comm., supra, 328 Mich. 363, 43 N.W.2d 888; Little Rock Furniture Mfg. Co. v. Commissioner of Labor, 227 Ark. 288, 298 S.W.2d 56; Marathon Electric Mfg. Corp. v. Industrial Comm., 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576; Lesser, Labor Dispute and Unemployment Compensation, 55 Yale Law Journal 167.

"It is one of the fundamental tenets of the unemployment compensation law that the administering

agency remain neutral in the labor dispute and refrain from passing on the merits of the dispute. Courts almost unanimously hold that the merits of a labor dispute are immaterial in determining the existence of the dispute, the rationale being that the unemployment compensation fund should not be used for the purpose of financing a labor dispute any more than it should be withheld for the purpose of enabling an employer to break a strike. Sakrison v. Pierce, supra, 66 Ariz. 162, 185 P.2d 528; In re Steelman, supra, 219 N.C. 306, 13 S.E.2d 544; Amory Worsted Mills, Inc. v. Riley, 96 N.H. 162, 71 A.2d 788; W. R. Grace & Co. v. California Employment Comm., 24 Cal.2d 720, 151 P.2d 215; Byerly v. Unemployment Comp. Board of Review, 171 Pa. Super. 303, 90 A.2d 322; Lawrence Baking Co. v. Michigan Unemployment Comp. Comm., supra 308 Mich. 198, 13 N.W.2d 260; T. R. Miller Mill Co. v. Johns, supra, 261 Ala. 615, 75 So.2d 675.

• • • •

"Moreover, the terms 'leaving work' or 'left his work' as used in unemployment compensation laws refer only to a severance of the employment relation and do not include a temporary interruption in the performance of services. Kempfer, Disqualification for Voluntary Leaving and Misconduct, 55 Yale Law Journal 147, 154. Absence from the job is not a leaving of work where the worker intends merely a temporary interruption in the employment and not a severance of the employment relation. Such is the case of strikers who have temporarily interrupted their employment because of a labor dispute. Under the prevailing view, they have not been deemed to have terminated the employment relationship and the voluntary leaving disqualification has no application to them. T. R. Miller Mill Co. v. Johns, supra, 261 Ala. 615, 75 So.2d 675; Mark Hopkins, Inc. v. California Employment Comm., 24 Cal.2d 744, 151 P.2d 229, 154 A.L.R. 1081; Knight-Morley Corp. v. Michigan Employment Security Comm., 352 Mich. 331, 89 N.W.2d 541; Marathon Electric Mfg. Corp. v. Indus-

trial Comm., supra, 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576."

We fully adopt this reasoning.

The third point upon which appellants rely is that the employees should have been disqualified for unemployment compensation benefits under § 59-9-5(d), N.M.S.A. 1953 Comp., which provides, in part, that:

> "An individual shall be disqualified for benefits * * *
>
> "(d) For any week with respect to which the commission finds that his unemployment is due to a *stoppage of work* which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; Provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that—
>
> "(1) He is not participating in or directly interested in the labor dispute which caused the *stoppage of work*; and
>
> "(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the *stoppage*, there were members employed at the premises at which the *stoppage* occurs, any of whom are participating in or directly interested in the dispute; * * *." (Emphasis added.)

The appellants claim that the term "stoppage of work" refers to the individual efforts of the employee, while the appellees argue that "stoppage of work" refers to a cessation or substantial curtailment of the employer's business. We are thus called upon to interpret this term.

We are not the first state supreme court to be confronted with this question. All fifty states have adopted unemployment compensation laws, and a majority of them have a provision disqualifying employees from benefits if the "unemployment is due to a stoppage of work which

exists because of a labor dispute * * *." Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U. Chi. L.Rev. 294 (1950); Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J. Urban L. 319 (1967); Annot., 61 A.L.R.3d 693 (1975). About twenty of the states have interpreted the term "stoppage of work" to mean a cessation or a substantial curtailment of the employer's business, while only one — Oklahoma — has interpreted the term to mean a stoppage of the individual work of the employee. Annot., 61 A.L.R.3d 693 (1975). We agree with the majority of states and conclude that the term "stoppage of work," as it is used in the context of our Unemployment Compensation Act, refers to the employer's business rather than the employee's work.[1]

The term "stoppage of work" was originally taken from "Draft Bills" prepared by the Committee on Economic Security, which in turn borrowed the phrase from British Unemployment Insurance Acts. Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, supra. Therefore, it is significant to note that:

> "When this country's fifty-one statutes were adopted, the phrase had long since acquired a settled construction from the British Umpires as referring 'not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed.' "

Id. at 308.

Were the phrase "stoppage of work" to refer to the employee's work, it would be redundant in the sentence "his

[1]We note the recent case of Hawaiian Tel. Co. v. State of Hawaii Dept. of L. and I. Rel., ... F.Supp. ..... (D. Hawaii 1975), wherein the Federal District Court of Hawaii declared that the State of Hawaii's interpretation and application of the "stoppage" of work clause in its Unemployment Compensation Act so impermissably alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U.S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work.

unemployment is due to a stoppage of work which exists because of a labor dispute * * *." If the statute read "his unemployment is due to a labor dispute," or "he stopped working because of a labor dispute," then it would be clear that the legislature intended to disqualify from receiving benefits all those employees who stop work because of a labor dispute, no matter how minimal the impact of their stopping is on the employer's operations.

Furthermore, the sentence "He is not participating in or directly interested in the labor dispute which caused the stoppage of work * * *" would be an extremely clumsy way of phrasing the idea, if "stoppage of work" referred to the employee's individual work. In fact, if we interpreted "stoppage of work" in this way, the whole of section (d) would read awkwardly at best. Therefore, a common sense approach to the words in their context leads us to the same conclusion that nearly all other courts have reached — that "stoppage of work" refers to the employer's business.

Finally, it must be stressed that our role in this situation is not to usurp the legislative function. As the Supreme Court of Arizona aptly pointed out in Sakrison v. Pierce, 66 Ariz. 162, 165-66, 185 P.2d 528, 530-31 (1947):

> "* * * Much is made in counsel's briefs of policy considerations. For example, on the one hand lies the charge that to allow compensation in such a case as this would be, in effect, to force employers and the state to finance a strike. On the other hand, it is claimed that to deny it would be to deny aid to those whom, among others, the Act was designed to protect (i.e., those who had participated in a labor dispute and lost — at least to the extent that others now had their jobs and their former employer's operations had been fully resumed). And that finally, a denial of compensation would seriously cripple their unquestioned right to strike. At the outset it should be made clear that this court is not concerned with any questions relative to the merits of the labor controversy itself. Our decision is not and cannot

> be determined by such factors. Instead it is determined by the choice that the elected legislative representatives of the people of this state have made for us. And whether or not the Act should compensate employees in this position is properly a choice for the legislature. * * * The function of this court, then, is simply to point out which route our legislature has chosen to travel."

Having then concluded that "stoppage of work" means a cessation or substantial curtailment of the employer's business, we are next confronted with the question of whether the employer's business was substantially curtailed at any time during the period from July 20, 1970 until November 30, 1970 when these workers went out on strike. What constitutes a substantial curtailment of work or operations at the employing establishment has generally been regarded by the courts as a question dependent upon the facts and circumstances of each case. Annot., 61 A.L.R.3d 693, 705 (1975). We agree.

The district court determined that the Commission's findings were supported by substantial evidence in the record as a whole, and accordingly adopted and entered the following findings of fact, among others, just as they had appeared in the Commission's decision of August 9, 1971:

> "7. Members of Teamster's Local No. 492 who struck the employer's place of business comprised about twenty percent of the employer's total work force.
>
> "8. Immediately after commencement of the strike, the employer began hiring replacements for the striking employees and had replaced as many as necessary to continue normal operations within a few days.
>
> "9. With the exception of some impact on the employer's interline freight business, there was no cessation of normal business activity or curtailment of the work force or productivity at the employer's place of business or establishment during the labor dispute."

The appellant challenges findings 8 and 9 and argues that the labor dispute did cause a substantial curtailment of the employer's business, thereby permitting the labor dispute disqualification provision, § 59-9-5(d), supra, to apply to the claimants here involved. In support of this challenge, appellant refers us to two letters from the attorney for the Company sent to the Commission in which certain unsubstantiated and unsupported figures relating to the curtailment of the Company's business are contained.

In contradistinction to these unverified figures we have the sworn testimony of Duncan A. McLeod, president of the Company, from the transcript of the hearings before the Commission on November 16, 1970. On direct examination, he testified as follows:

> "Q Wasn't there any cessation of productive activity at your place of business resulting from this strike at any time?
>
> "A No, not necessarily. We got back and it was operating.
>
> "Q Well, when all these men who are employed, who apparently were employed by you prior to July 20th, who left their work, didn't that interfere with your production at all?
>
> "A Oh, we were a little slow for a few days."

Appellant also refers us to certain pages in the supplemental transcript of record, but we have yet to find any evidence there which casts any doubt upon the accuracy of the district court's findings.

In short, the appellant has failed to demonstrate to us that there is any reason to reject the findings of the Commission and the district court with regard to the impact that the labor dispute had on the employer's business. There was substantial evidence to support the district court's findings 7, 8 and 9, and we conclude that the employer's business did not suffer any substantial curtailment when the employees involved here walked off their jobs.

The judgment of the trial court will be affirmed.

IT IS SO ORDERED.

John B. McManus, Jr.,
Chief Justice

WE CONCUR:

Samuel Z. Montoya, J.
Dan Sosa, Jr., J.

OMAN and STEPHENSON, JJ, dissenting.

STEPHENSON, J. (dissenting)

I am unable to agree with the construction placed by the majority upon the Labor Dispute Disqualification section of the New Mexico Unemployment Compensation Law. § 59-9-5(d), N.M.S.A. 1953. The construction of that statute which I believe to be correct would require a decision for the company without reaching the other issues dealt with by the majority. I will accordingly confine my comments to that issue.

The court below found that the claimants were employees of the company and members of a labor union. Failing to reach a mutually satisfactory collective bargaining agreement with the company on economic issues, the union and the employees struck the company's place of business. All of the claimants participated in the strike. Union members who struck the company comprised about twenty percent of the company's total work force. However, under the construction I would place upon the cited statute, this fact is irrelevant.

The Commission contends that "stoppage of work," as that term is used in § 59-9-5(d), refers not to the claimant's work, but to a stoppage or curtailment of the employer's operation. The question is one of first impression in this state. The majority has opted for the Commission's interpretation, but in my opinion the phrase refers to a cessation of work by the employees as a result of a labor dispute, viz. a strike.

I would concede that the statute is awkwardly worded. By parsing the sentence in differing ways and substituting words for phrases, proponents of the two contending theories can endlessly argue that the theory which they espouse is the more reasonable, as the parties have done in their briefs. For example, one could point out that in § 59-9-5 the word "work" is used in each subsection. In the earlier ones the word clearly refers to the employee, and it would be anomolous to apply a different meaning to the work in subsection (d). I eschew this argument as the basis for my opinion, although I agree with the reasoning of the majority in Board of Review v. Mid-Continent Petroleum Corp., 193 Okla. 36, 141 P.2d 69 (1943). I do not think the statute, however inartfully worded, is that opaque.

I premise my opinion on rather simple and well-settled rules of statutory construction and grammar. This court in its opinion in In re Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 267 (1941), quoting from Sutherland on Statutory Construction § 408 (2 ed. 1904), said:

> "Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. In other words, it is presumed that the writer intended to be understood according to the grammatical purport of the language he has employed to express his meaning."

The court then proceeded to define the doctrine of the last antecedent by quoting from 59 C.J. Statutes § 583 (1932) as follows:

> "By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote."

See also Hughes v. Samedan Oil Corporation, 166 F.2d 871 (10th Cir. 1948). Applying these rules to the statute before us, we observe that a "labor dispute" and not a "stoppage of work" must exist at the factory, establishment or other premises.

I agree with the reasoning of the special concurring opinion of Justice Davison in Board of Review v. Mid-Continent Petroleum Corp., supra. Justice Davison stated the definition of the last antecedent rule, quoting from a prior Oklahoma case, to be:

> "A limiting clause in a statute is generally to be restrained to the last antecedent, unless the subject matter requires a different construction."

Certainly there is nothing about the subject matter here which requires a different construction. He then continued:

> The last antecedent in the statute before us is the "labor dispute," not the "stoppage of work."
>
> A labor dispute may exist at the factory without a "shutdown." Of course, if a labor dispute does result in a shutdown or stoppage of operations at the plant or factory it may result in a stoppage of work for individuals not involved in the labor dispute. Individuals not so involved are the subject of consideration by the legislature in the statutory provisions immediately succeeding the above-quoted language.
>
> It is thus my opinion that the thing which must exist at the factory is, under the terms of the statute, the labor dispute, not the stoppage of work; that when the

labor dispute exists at the factory resulting in a stoppage of work by the individual he is disqualified to receive benefits if he is a participant in the labor dispute and not working by reason of his own voluntary desire, regardless of whether the factory stops or does not stop operating.

My opinion is bolstered by other considerations, though I reach the above conclusion without their aid. I note the statement of policy which the Legislature included in the Act in § 59-9-2 N.M.S.A. 1953.[1] I cannot read the phrase "through no fault of their own" as meaning or implying evil or wrongdoing or that an employee's work stoppage was subject to censure. Board of Review v. Mid-Continent Petroleum Corp., supra. In ordinary parlance it would mean unemployment due to the employee's own volition or at his decision or election. Considering the phrase in § 59-9-2 in that light, it is clear to me that the very purpose of the Act is to provide compensation for those who are involuntarily unemployed. That certainly does not include strikers.

As the majority has pointed out, the conclusion that they have reached is supported by a majority of cases which have passed upon the issue. Most of these cases trace their way back to Lawrence Banking Co. v. Michigan Unemployment C. Com'n, 308 Mich. 198, 13 N.W.2d 260 (1944). That case appears to rely heavily on the English National Insur-

[1]"Declaration of state public policy. As a guide to interpretation and application of this act [59-9-1 to 59-9-29], the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. *Involuntary unemployment* is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state requires the enactment of this measure, for the compulsory *setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own*". (Emphasis added.)

ance Act of 1911 and on cases construing it. Bearing in mind that we are now in the year 1976 and that the issue presented is one of first impression in New Mexico, no reason has been suggested to me as to why we should now adopt a construction placed upon a statute of a foreign country by authorities charged with its administration not long after the turn of the century. In fact I am not at all sure why the Michigan court in Lawrence Baking Co. even addressed the problem which confronts us. The claimants there were not at any material time unemployed because of a labor dispute so far as I can determine from the opinion. To the contrary, they were unemployed because they had been discharged and replaced by others. The strike for all practical purposes, only lasted about fifteen minutes. I further observe that two strong dissents were filed in Lawrence Baking Co. with which I generally agree.

Much is said in the briefs about whether or not a governmental policy of neutrality exists in relation to strikes, a subject touched upon by the majority in its discussion of Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947). Since I do not predicate my opinion upon the existence or nonexistence of such a policy, I express no opinion as to its existence. I will content myself with saying that if it does not exist, it should.

Still bearing in mind that we are confronted with an issue of first impression and that we are free to adopt an interpretation of the statute which now best suits our situation, I find it interesting that in more modern times several states have refused to adopt "stoppage of work" language, or have eliminated that language after state courts have allowed unemployment compensation to be paid to strikers. In New York and California "stoppage of work" language is absent and strikers are generally ineligible for benefits. For example, see Cal. Unep. Ins. § 1262 (West 1972); N.Y. Labor Law § 592 (McKinney 1965) (seven week waiting period); Colo. Rev. Stat. Ann. § 8-73-109 (1974). There are about fifteen such states. The Texas statute reads "claimant's work stoppage." Vernon's Tex. Stat. art.

5221b-3 (1971). Two cases decided in the 1950's in Arizona held that stoppage of work referred to the employer's business. Sakrison v. Pierce, supra; Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P.2d 707 (1950). Soon thereafter in 1952 the Arizona Legislature deleted "stoppage of work" and disqualified those employees involved in a labor dispute. Ariz. Rev. Stat. Ann. § 23-777 (1971). Michigan also changed its statute after the courts interpreted stoppage of work as the employer's operation. Lawrence Baking Co. v. Michigan Unemployment C. Com'n, supra, and Mich. Comp. Laws Ann. § 421.29 (1967).

For the reasons stated, I respectfully dissent.

Donnan Stephenson
Justice

I CONCUR:

LaFel E. Oman, C.J.

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Thursday, January 15, 1976

NO. 10323

KIMBELL, INC., d/b/a FOODWAY,
et al.,

Petitioners-Appellees,

vs. Bernalillo County

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,

Respondents-Claimants-
Employees-Appellants.

This matter coming on for consideration by the Court upon motion of Appellees for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises:

NOW, THEREFORE, IT IS ORDERED that the motion of Appellees for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY
Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico.
(SEAL)

Filed: March 24, 1976

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

KIMBELL, INC., d/b/a FOODWAY,
FURR'S, INC., ALLIED SUPER-
MARKETS, INC., d/b/a K-MART,
SAFEWAY STORES, INC., and
SHOP RITE FOODS, INC., d/b/a
PIGGLEY WIGGLEY,

Petitioners-Appellees,

v. No. 10323

EMPLOYMENT SECURITY COMMISSION
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,

Respondent-Claimant
Employees-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Kimbell, Inc., d/b/a Foodway, Furr's, Inc., Safeway Stores, Inc., and Shop Rite Foods, Inc., d/b/a Piggley Wiggley, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico reversing judgment of the District Court of the Second Judicial District, entered in this action on December 29, 1975, and from the order of the Supreme Court of the State

of New Mexico entered January 15, 1976, denying the Motion of Appellees for a Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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Petitioners-Appellees

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This will certify that on this
22nd day of March, 1976, in
compliance with Rule 33(1) of
the Rules of the Supreme Court
of the United States, a copy of
the foregoing Notice of Appeal
was served upon the following
being all parties:

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